M Veloo Muniandy & Anor v United Malayan Banking Finance Bhd

HIGH COURT — ORIGINATING SUMMONS NO 24-931-1994
MOHD HISHAMUDIN J
17 JULY 1995

Land Law *— Sale of land — Order for sale by public auction — Application for declaration that sale was invalid — Public advertisement of auction prior to sale — Failure to advertise auction — Conduct of applicants relevant — Applicants induced respondents not to advertise — Application an abuse of process — National Land Code 1965 s 258(1)(b)*

Civil Procedure *— Affidavit — Failure to make full disclosure — Suppression of material facts — Application would be dismissed*

The applicants sought a declaration that an auction carried out by the Alor Setar High Court in July 1994 was invalid on the grounds that the respondent had failed to advertise the auction as directed by the registrar and as required by s 258 of the National Land Code. The respondent, in its affidavit, said it had sent a notice of the auction to a newspaper but later withdrew it at the request of the applicants who said they intended to settle their debts prior to the auction. The applicants did not settle their debts and the property was auctioned on the due date.

Held, dismissing the application:

(1) The respondent did everything to comply with the order of the registrar except advertise the auction in the paper. They had prepared the notice and sent it for publication and only cancelled it because of the applicant's promise.

(2) Although it was the respondent's duty to comply with the registrar's order, the applicants' conduct was unmeritorious. Inducing the respondent not to advertise the auction was tantamount to abetting the respondent in committing a contempt of court. The applicants therefore did not come to court with clean hands, having committed an act of deception and the application was an abuse of the process of the court.

(3) The application would also be refused as the applicants also did not make full disclosure in their affidavit. They failed to disclose they had induced the respondent to withdraw the advertising which amounted to suppression of material facts.

[Bahasa Malaysia summary

Pemohon meminta satu deklarasi bahawa satu jualan lelong yang dijalankan oleh Mahmakah Tinggi Alor Setar pada Julai 1994 adalah tidak sah atas alasan bahawa penentang telah gagal mengiklan jualan lelong itu seperti diperintahkan oleh pendaftar

dan seperti yang diperlukan oleh s 258 Kanun Tanah Negara 1965. Penentang, dalam afidavitnya, mengatakan bahawa ia telah menghantar satu notis jualan lelong itu kepada satu suratkhabar tetapi kemudiannya menariknya balik atas permintaan pemohon yang mengatakan bahawa mereka berniat menyelesaikan hutang mereka sebelum jualan lelong itu. Pemohon tidak menyelesaikan hutang mereka dan hartanah itu telah dilelong pada tarikh yang telah ditetapkan.

Diputuskan, menolak permohonan itu:

(1) Penentang telah melakukan kesemua untuk mematuhi perintah pendaftar kecuali mengiklan jualan lelong itu dalam surarkhabar. Mereka telah menyediakan notis itu dan menghantarnya untuk penerbitan dan cuma membatalkan iklan itu kerana janji pemohon.

(2) Walaupun adalah menjadi tugas penentang untuk mematuhi perintah pendaftar, kelakuan pemohon tidak mempunyai merit. Mendorong penentang supaya tidak mengiklan jualan lelong itu samalah seperti bersubahat dengan penentang dalam melakukan penghinaan mahkamah. Pemohon tidak datang ke mahkamah dengan tangan yang bersih, selapas melakukan tindakan penipuan dan permohonan ini adalah satu penyalahgunaan proses mahkamah.

(3) Permohonan ini juga akan ditolak kerana pemohon tidak membuat pendedahan yang penuh di dalam afidavit mereka. Mereka gagal mendedahkan bahawa mereka telah mendorong penentang supaya menarik balik pengiklanan itu dan itu samalah dengan menyekat fakta-fakta penting.]

Notes

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed) paras 1915–1925.

For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

Cases referred to

Low Kum Yoon v Teh Kim Huah [1979] 1 MLJ 83 (refd)

R v General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex p Princess Edmond de Polignac [1917] 1 KB 486 (folld)

Legislation referred to

National Land Code 1965 ss 258(1)(b), 266(1)

Zawawi bin Kamaruzaman (*Thanggaiah & Co*) for the applicants.

Neoh Kheng Sooi and *Norizah bte Wahab* (*Neoh, Norizah & Co*) for the respondent.

Mohd Hishamudin J: The applicants in this case had filed an originating summons for a declaration that the public auction on 23 July 1994, 10.30am carried out by the Alor Setar High Court, which sold off their property comprised in HS (D) 1484/89 PT 10367, Mukim Sungai Pasir, Daerah Kuala Muda, Kedah at a price of RM40,000 is null and void.

The applicants, in their supporting affidavit, gave the ground that the respondent had failed to advertise a notice for public auction in a local newspaper at least seven days before the auction date, as directed by the senior assistant registrar.

Encik Zawawi bin Hj Kamaruzzaman, the learned counsel for the applicants, submitted that the failure on the part of the respondent to advertise rendered the sale invalid.

Section 258(1)(b) of the National Land Code 1965 provides:

> Procedure prior to sale.
>
> 258(1) Where any such order has been made, it shall be the duty of the Registrar of the court —
>
> (a) ...
>
> (b) to see that the sale is publicly advertised in accordance with rules of court or, in the absence of any rule in that behalf, the practice customarily adopted in the state.

The Rules of the High Court is silent on the public advertisement of the notice of auction but it has always been a practice of the High Court in the state of Kedah to make an order (pursuant to a summons for direction) requiring that the sale be advertised in a local newspaper.

Accordingly, at the hearing of the summons for direction, the senior assistant registrar made an order, inter alia, that the notice for the public auction be published in a local newspaper at least seven days before the date of the auction.

The respondent in their affidavit stated that they had served the order for sale and informed the applicants of the date of the auction. The respondent had also stated that on 10 July 1994 they had sent a notice of the public auction to The Star Publication (M) Sdn Bhd, vide their letter dated 3 July 1994 requesting for it to be published on 13 July 1994. However, on 10 July 1994, the counsel for the applicants, Encik Zawawi, accompanied by another representative of the applicants, came to see the respondent's solicitor, Puan Norizah bte Wahab, at the latter's office. At the meeting, the representative of the applicants had asked Puan Norizah to cancel the advertisement because the applicant intended to settle the debts before the auction date. Based on this undertaking, the respondent, accordingly, through their solicitor, instructed *The Star* to cancel the said advertisement, which the latter did.

Unfortunately, the applicants did not make any payment, nor did they subsequently contact the respondent or the respondent's solicitors;

and on the date fixed for the auction ie 23 July 1994, the property was auctioned by the court under the direction of the senior assistant registrar.

Mr Neoh, the learned counsel for the respondent, submitted the there was no wilful refusal on the part of his client not to follow the direction of the senior assistant registrar: the respondent was prompted by the applicants to withdraw the advertisement on the belief that the applicants would settle the debt before the auction date.

It is clear from the facts that the respondent had done everything to comply with the order of the senior assistant registrar except advertising the notice of the public auction in the local newspaper. But they had prepared the notice and sent it for publication, and would not have it cancelled had it not been due to the promise made by the applicants.

Now as far as declaratory judgments are concerned, it is established law that the power to make declaratory judgments is a discretionary one which should be exercised with care and caution and granted sparingly and judicially with regard to all the circumstances of the case (*Low Kum Yoon v Teh Kim Huah* [1979] 1 MLJ 83.)

In the present case, in considering the application, the conduct of the parties had to be taken into consideration. In the case before me, on the facts, I think the conduct of the applicants was unmeritorious. It is true that it was the duty of the respondent to comply with the Senior assistant registrar's order, that is, to advertise the notice of public auction in a local newspaper. But was the respondent the only party at fault? In the first place, in view of the order of the senior assistant registrar, the applicants should not have asked the respondent to withdraw the advertisement. The act of the applicants in inducing the respondent not to advertise the said notice tantamounts to abetting the respondents in committing a contempt of court. In view of the order of the senior assistant registrar, if at all there was a genuine intention to settle the debt before the auction, the proper course of action was not to cancel the advertisement but for the applicants to tender payment to the registrar of the court at any time before the conclusion of the sale, as provided for under s 266(1) of the National Land Code 1965. Indeed, on my part, upon reading the affidavits, I am not convinced that there was a genuine attempt by the applicants to settle the debt before the date of the auction. From what I gather from the affidavits, all that the applicants were interested in was the cancellation of the auction. If the applicants were sincere in their intention to settle the debt before the auction date, they would have contacted the respondent to explain why the debt could not be settled before the date of the auction.

It is, therefore, clear that the respondent was not the only party at fault. The act of the applicants in inducing the respondent to withdraw the advertisement, in defiance of a court order, and thereafter renegade on their promise to settle the debt, showed that they have not come to court with a clear conscience. The applicants had committed an act of deception. This application is clearly an abuse of the process of court.

There is, however, yet another reason why I should refuse the declaration prayed for. In their affidavit the applicants had never disclosed the facts in full. In particular they had not filed an affidavit in reply to explain why they did not pay the debt before the date of auction as promised or at least to explain why they did not contact the respondent to explain why they could not make the payment. Indeed in the first place, their supporting affidavit did not disclose that it was they who had induced the respondent to withdraw the advertisement upon the undertaking that they would settle the debt before the date of the auction. In *R v General Commissioners for the Purposes of the Income Tax Acts For the District of Kensington, ex p Princess Edmond de Polignac* [1917] 1 KB 486 the Court of Appeal refused a writ of prohibition on the grounds that there had been a suppression of material facts by the applicant in her affidavit. In the case before me, the fact that the applicants had failed to disclose in their affidavit the matters that I had just referred to, to my mind, tantamounts to a suppression of material facts. Although this is not a case of an application for a writ of prohibition but for a declaration, I think, nevertheless, the principle requiring full disclosure of facts should equally apply.

Accordingly, this application is dismissed with costs.

Application dismissed.

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